

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA)

NO. 05-CR-10102 JLT

v.)

JOHN BRUENS, MARY STEWART,)
MELISSA VAUGHN, and)
MARC SIROCKMAN)

Defendants.)
_____)

**SUPPLEMENTAL AUTHORITY FOR DEFENDANTS'
PROPOSED JURY INSTRUCTION NO. 30**

Pursuant to Fed. R. Crim. P. 30, the Defendants respectfully submit this Supplemental Authority for Proposed Jury Instruction No. 30.

Respectfully submitted,

**JOHN BRUENS, MARY STEWART,
MELISSA VAUGHN, and MARC SIROCKMAN,**

By their undersigned attorneys.

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Matthew Levitt
Counsel for Marc Sirockman

/s/ Thomas McC. Souther
Thomas McC. Souther
Counsel for John Bruens

/s/ Mark A. Berman
Mark A. Berman
Counsel for Mary Stewart

/s/ Adam S. Hoffinger
Adam S. Hoffinger
Counsel for Melissa Vaughn

Dated: April 16, 2007

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 30

Knowing and Willful Conduct

Supplemental Authority:

See United States v. MacKenzie, et al., CR-01-10350 (D. Mass. 2004) (instructions given to jury) (“The government has to prove beyond a reasonable doubt that defendant was aware of the legal duties imposed by the anti-kickback statute, even if the defendant did not know the specific statute involved, that the defendant knew the conduct was prohibited, and despite that awareness, the defendant nevertheless engaged in conduct with the specific intent to disobey or disregard the known legal duties”) (relevant excerpt attached hereto as Exhibit A); *United States v. Weinbaum, et al.*, No. 03-CR-1587-L (S.D. Cal. 2005) (instructions given to jury) (“In the context of the Anti-Kickback Statute, to establish that a defendant acted knowingly and willfully, the government must prove that the defendant (1) knew that the Anti-Kickback Statute prohibited the offering or paying of remuneration to induce referrals, and (2) engaged in prohibited conduct with the specific intent to disobey the law.”) (relevant excerpt attached hereto as Exhibit B).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	
)	No. 03-CR-1587-L
Plaintiff,)	
)	
v.)	
)	
BARRY WEINBAUM; TENET)	
HEALTHSYSTEM HOSPITALS, INC.;)	
and ALVARADO HOSPITAL MEDICAL)	
CENTER, INC.,)	
)	
Defendants.)	
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JURY INSTRUCTIONS

The Government must prove that each defendant acted "knowingly" and "willfully." An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

An act is done willfully if done voluntarily and intentionally with the purpose of violating a known legal duty.

In the context of the Anti-Kickback Statute, to establish that a defendant acted knowingly and willfully, the government must prove that the defendant (1) knew that the Anti-Kickback Statute prohibited the offering or paying of remuneration to induce referrals, and (2) engaged in prohibited conduct with the specific intent to disobey the law.

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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
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4 * * * * *
5 UNITED STATES, *
6 Plaintiff *
7 VERSUS * CR-01-10350-DPW
8 ALAN MACKENZIE, HENRY VAN *
9 MOURIK, DONNA TOM, DONALD PATTON *
ERIC OTTERBEIN, RITA JOKIAHO, *
CAREY SMITH, MARK SMITH, *
Defendants *
10 * * * * *

11
12 BEFORE THE HONORABLE DOUGLAS P. WOODLOCK
13 UNITED STATES DISTRICT COURT JUDGE
14 JURY TRIAL - DAY 49
15 July 9, 2004
16
17 Courtroom No. 1 - 3rd Floor
18 1 Courthouse Way
Boston, Massachusetts 02210,
19 9:00 A.M. - 11:45 A.M.
20
21 Debra M. Joyce
Official Court Reporter
22 John Joseph Moakley District Courthouse
1 Courthouse Way - Suite 3204
Boston, Massachusetts 02210

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Donald Patton, Defendant.

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in charge of a pharmacy and they say we'll support your team if you buy more drug, then we're not talking about cultivating a general business relationship. We're then talking about a quid pro quo within the heartland of the anti-kickback statute.

So if you find as to any particular transaction there was an effort to cultivate a business relationship, then you must still consider whether the effort to cultivate that business relationship was also an effort to induce a specific drug transaction through the offer of a quid pro quo. If it was, you may find the effort to be an inducement within the second element.

The third element is one in which you should understand that the government does not have to suffer a loss in connection with the use of remuneration as a quid pro quo. This instruction arises as a way of explaining the third element of the statutory violation.

The government must prove beyond a reasonable doubt that the drugs for which remuneration was offered or paid were in turn to be reimbursed in whole or in part from a federal health care program. As I've said, this is Medicare and Medicaid that we're talking about in this case. But the government does not have to prove that the programs actually lost money as a result of the offer or payment of remuneration. The statute does not require the government to prove the payment of remuneration -- strike the word "federal" -- caused an increase in the case of the cost of the government administering a federal health care program.

The final element focuses on what we sometimes call the state of mind requirements: the knowingly, willfully, and intentionally aspects of the charge that the government must prove.

To demonstrate that a defendant acted knowingly, the government must prove beyond a reasonable doubt as to that defendant that the defendant had knowledge of the facts which made his or her conduct illegal; that is, that the defendant acted voluntarily and intentionally and not because of some

mistake or accident or misunderstanding. In connection with the anti-kickback statute, it's not sufficient for the government to prove that a defendant should have knowledge of particular facts simply because that defendant held a particular position within TAP. The government must prove beyond a reasonable doubt as to each defendant that the defendant had actual knowledge of the facts that made his or her conduct illegal.

To demonstrate that a defendant acted willfully, the government must prove beyond a reasonable doubt as to each defendant that the defendant acted voluntarily and intelligently and with the specific intent that the underlying crime be committed; that is to say, with bad purpose, either to disobey or disregard the law, and not by some act of ignorance or accident or mistake.

To demonstrate that a defendant acted intentionally to violate the anti-kickback statute, the government must prove beyond a reasonable doubt that the defendant was aware of the legal duties that were imposed by the anti-kickback statute. That does not mean that the defendant had to know there is a specific statute that was called the anti-kickback statute and found in some place in the United States Code. But the defendant must be shown to have known that there are legal duties of the type that are embodied in that statute and to have specific intent to violate those duties.